

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:WR:RMD:DEN:TL-N-251-00

JRRobb

date: 27 MAR 2000

to: Chief, Examination Division, Rocky Mountain District
Attn: Joyce Schulte, Case Manager, E:2:8

from: District Counsel, Rocky Mountain District, Denver

subject: [REDACTED]

Consents to Extend the Time to Assess Tax

Our advice has been requested as to the proper party to execute a Form 872 (Consent to Extend Time to Assess Tax) for the [REDACTED] consolidated group's taxable years ending [REDACTED] and [REDACTED]. We recommend that the Form 872 be executed as indicated below.

FACTS

[REDACTED] was a Delaware Corporation. For the taxable years ending [REDACTED] and [REDACTED] [REDACTED] filed consolidated returns as the common parent of a consolidated group (the "[REDACTED] group"). On [REDACTED] and [REDACTED] [REDACTED] announced an intent to merge. On [REDACTED] the shareholders approved and adopted the Agreement and Plan of Merger between [REDACTED] and [REDACTED], a wholly owned subsidiary of [REDACTED], providing for the merger of [REDACTED] into [REDACTED]. As a consequence of the merger, [REDACTED] and its subsidiaries (old [REDACTED]) were dissolved. Subsequent to the merger, [REDACTED] changed its name to [REDACTED] ("new [REDACTED]"). New [REDACTED] is a wholly owned subsidiary of [REDACTED] and will be included in the consolidated income tax return filed by [REDACTED].

For tax purposes, [REDACTED] and new [REDACTED] are treating the transaction as a forward triangular merger under the provisions of I.R.C. § 368(a)(2)(D) which allows the use of an acquisition subsidiary without disqualifying the transaction as a statutory merger under I.R.C. § 368(a)(1)(A).

DISCUSSION

Treas. Reg. § 1.1502-77(a) provides generally that the common parent of a consolidated group is the sole agent for each subsidiary in the group for any consolidated return year. Expressly included in the authority of the common parent is the power to execute waivers. Treas. Reg. § 1.1502-77(a) further provides that its provisions shall apply "whether or not a consolidated return is made for any subsequent year, and whether or not one or more subsidiaries have become or have ceased to be members of the group at any time."

Treas. Reg. § 1.1502-77T provides for alternative agents where a corporation that is a common parent of a group ceases to be a common parent. Under Treas. Reg. § 1.1502-77T(a)(3) & (4), a waiver of the statute of limitations given with respect to a group will be deemed to be given by the agent for the group if it is given by any of the following:

- (i) The common parent of the group for all or any part of the year to which the notice or waiver applies,
- (ii) A successor to the former common parent in a transaction to which section 381(a) applies,
- (iii) The agent designated by the group under § 1.1502-77(d), or
- (iv) if the group remains in existence under § 1.1502-75(d)(2) or (3), the common parent of the group at the time the notice is mailed or the waiver given.

In this case, [REDACTED] merged into [REDACTED] a wholly owned subsidiary of [REDACTED]. [REDACTED] and its subsidiaries were dissolved as a result of the merger. [REDACTED] subsequently changed its name to [REDACTED] (new [REDACTED] and will be included in the consolidated tax returns filed by [REDACTED]. As new [REDACTED], formerly [REDACTED] is the successor-in-interest to old [REDACTED], we recommend that the Form 872 be prepared as follows:

- a. The line for the taxpayer's name should read:

[REDACTED] (EIN: XX-XXXXXXX), formerly [REDACTED]
[REDACTED] (EIN: XX-XXXXXXX), as agent for the [REDACTED]
[REDACTED] consolidated group and as successor-in-
interest to [REDACTED] (EIN: XX-XXXXXXX);*

b. The following footnote should be put at the bottom of the page (the reference to [REDACTED] in the footnote is to old [REDACTED]):

* This is with respect to the consolidated tax liability of the [REDACTED] (EIN: XX-XXXXXXX) [REDACTED] consolidated group for the taxable years [REDACTED] and [REDACTED].

c. The EIN of new [REDACTED] should be used in the box for the taxpayer's EIN; and

d. The signature block should use the name "[REDACTED] (EIN: XX-XXXXXXX)" (new [REDACTED] and should be executed by a current officer of new [REDACTED]. You have indicated that both [REDACTED] Director of Taxes for old [REDACTED] and [REDACTED] Director of Taxes for [REDACTED] and a corporate officer of [REDACTED], have been designated officers of new [REDACTED]. Since both are current officers of new [REDACTED] either one may sign the Form 872. Regardless of who signs the Form 872, we recommend that you type the name of the individual and his title on the Form 872.

If you have any questions regarding this matter, please call James R. Robb at (303) 844-2214, ext. 253.

MARTIN B. KAYE
District Counsel

By:


JERRY L. LEONARD
Assistant District Counsel